87-696 (1)

No. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

SOCIETY ORDO TEMPLI ORIENTIS IN AMERICA,
et al,
Petitioners

v.

GRADY MCMURTRY, et al
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals violated Due Process by deciding the case on the basis of a district court opinion which defendants-petitioners were never allowed to brief.

2. Whether the courts below violated the First Amendment by resolving the case through deciding disputed questions of internal church doctrine.

3. Whether the court of appeals should have applied a "reasonable doubt" standard rather than a "substantial evidence" standard in reviewing the district court's determination of which party represented the legitimate church in question.

4. Whether the courts below violated Due Process and the First Amendment by resolving church property and other issues in the case without stating how they reached their results.

5. Whether the First Amendment provides a privilege in the law of libel for statements made in the context of religious controversies.

LIST OF PARTIES

Society Ordo Templi Orientis in America, a corporation and Marcelo Ramos Motta were defendants in the district court, appellants in the Court of Appeals and are petitioners here. Grady McMurtry, Phyllis Seckler, Helen Parsons Smith, William E. Heidrick, James Wasserman, and Ordo Templi Orientis, a

corporation, were plaintiffs in the district court, appellees in the court of appeals and are respondents here.

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McMurtry v. Society Ordo Templi Orientis, No. 85-2897 (9th Cir. Jan. 12, 1987) (order of remand).

McMurtry v. Society Ordo Templi Orientis, No. C-83-5434-CAL (N.D. Cal. Apr. 6, 1987)(second district court opinion).

McMurtry v. Society Ordo Templi Orientis, No. 85-2897 (9th Cir. May 8, 1987)(order denying motion to file brief).

McMurtry v. Society Ordo Templi Orientis, No. 85-2897 (9th Cir. Jun. 4, 1987) (opinion of affirmance).

McMurtry v. Society Ordo Templi Orientis, No. 85-2897 (9th Cir. Aug. 3, 1987) (order denying petition for rehearing).

JURISDICTION

The opinion of affirmance of the court of appeals was entered on June 4, 1987. A petition for rehearing was filed on June 18, 1987, and was denied on August 3, 1987. The statutory provision conferring jurisdiction on this Court to review the decision by writ of certiorari is 28 U.S.C. § 1254(1).

LAWS INVOLVED

First Amendment: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Basis for Federal Jurisdiction

The bases for subject matter jurisdiction in the federal district court were 28 U.S.C. § 1338, providing for claims involving copyrights and trademarks and 28 U.S.C. § 1332, providing for diversity jurisdiction. Plaintiffs were residents of California and New York, defendants of Tennessee and Brasil. The amount in controversy was $290,000.

Background

In this case, petitioners were excommunicated from their church and slapped with $40,000 in general and $100,000 in punitive damages by federal

courts which did not cite a single piece of evidence in support of their opinions, refused to let petitioners brief the most important findings in the case, despite admissions by respondents that the courts had erred, and in contravention of church doctrine, trampling petitioners' First Amendment rights in a manner that can only be characterized as astonishing, outrageous and even dishonest.

The case involves a dispute between a Brasilian group (defendants-petitioners) and an American group (plaintiffs-respondents), each of which claims to be the sole legitimate representative of the same church and possessed of supreme worldwide authority within the church.

The church is in the form of a masonic organization, originally known as the Ordo Templi Orientis or OTO. It is

an international church with branches in many different countries.

The origins of the OTO are obscure, but the present organization seems to have originated in Germany at the beginning of this century. The worldwide head of the OTO is known as the "Outer Head of the Order" or "OHO". The OHO's authority within the OHO is plenary. The record indicates that a German named Theodor Reuss was OHO early in this century and was succeeded around 1921 e.v.* by an English author and mystic named Aleister Crowley. Crowley was succeeded as OHO after his death in 1947 e.v. by another German, Karl Johannes

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* The OTO's spiritual system is not Christist, and it notes its objection to the use of a Christist dating system by adding "e.v." (for "era vulgari" or "common era") after the Christist year. The OTO counts years from April 8, 1904 e.v., the beginning of the new Aeon in the OTO system of belief.

Germer, who held the position until his death in 1962 e.v.

OHO Succession

As the courts below viewed the case, the central dispute between the parties was as to who succeeded Karl Germer as OHO. The parties both claim that their own leader succeeded to the OHO position and also differ as to the proper method of effecting the OHO succession within the OTO. [The record also disclosed an English group and a Swiss group that made similar claims for their own leaders. The English and Swiss groups were not parties to the case and no members of those groups were called as witnesses in the case.]

Defendants' Theory of Succession: Defendants contend that the succession is

effected by appointment by the prior OHO. That is, the OHO appoints his or her successor. Defendants contend that Karl Germer appointed defendants' leader, Marcelo Ramos Motta to be successor OHO. Defendants rely on a letter from Mr. Germer's widow to Mr. Motta, immediately after Mr. Germer's death, saying that Mr. Germer had designated Mr. Motta to be "the Follower".

Plaintiffs' Theory of Succession: Plaintiffs' position is not entirely clear, since they could not agree even among themselves. At one point they seemed to contend at trial that the OHO succession is not effected by appointment but by election following the death of an OHO. Nevertheless, they did not seem to contend that their own leader, Grady McMurtry, was elected OHO. Instead, three different plaintiffs asserted three

different mutually contradictory theories as to why McMurtry is OHO:

(1) He is doing the OHO's administrative work.

(2) He has a letter from Aleister Crowley giving McMurtry certain emergency powers in California.

(3) Crowley made a secret amendment to the OTO Constitution which Crowley told no one about except McMurtry; that amendment created a new position in the OTO known as a "Caliph"; the "Caliph" is the seniormost position in the OTO; after the death of Karl Germer, McMurtry as "Caliph" and therefore seniormost member, succeeded to the OHO position.

As discussed below, the district court and court of appeals did not accept <u>any</u> of these theories of the OHO

succession. That is, the courts did not accept defendants' theory of OHO succession or any of plaintiffs' theories. Instead they applied some other, though unexplained theory.

Plaintiffs' Pre-Trial Position

While plaintiffs contended at trial that their leader was the OHO, they had never done so before. Plaintiffs' leader McMurtry testified as to his OTO status in a related case a year before the trial in the present case, see Motta v. Samuel Weiser, Inc., 598 F. Supp. 941 (D.Maine 1984), aff'd 768 F.2d 481 (1st Cir.), cert. denied, ___ U.S. ___ (Dec. 16, 1985), but did not claim to be OHO. 598 F. Supp. at 946. Similarly, in his deposition in this case he did not claim to be OHO.

McMurtry's two main co-plaintiffs, Helen Smith and Phyllis Seckler, had both denied his authority as OHO before testifying in court.

When McMurtry was asked to explain at trial why he had never before claimed to be OHO, his response was, "I didn't think of it at the time."

Amazingly, the courts below nevertheless found that McMurtry was OHO, as discussed below.

Mr. Motta's Membership

Although before trial, plaintiffs' had always considered defendants' leader, Mr. Motta, to be an OTO member, at trial they took the position that he was not a member.

Defendants introduced letters antedating the litigation by more than

two decades in which Mr. Motta and the previous OHO, Karl Germer, discussed the OHO and the details of one of its secret rites. Defendants also introduced a letter from Mr. Germer to Mr. Motta offering the latter a specific office and powers within the OHO as well as a later letter from Mrs. Germer after Mr. Germer's death confirming Mr. Motta's OTO authority. The district court was also made aware of another federal court decision which found that Mr. Motta was an OTO member. Motta v. Samuel Weiser, Inc., supra, 598 F. Supp. at 943.

Beyond this, defendants introduced numerous letters from plaintiffs themselves which repeatedly and consistently referred to and treated Mr. Motta as a member of the OTO and even stating specifically that plaintiffs

possessed records confirming Mr. Motta's OTO office and authority.

Plaintiffs nevertheless recanted all of their prior, written, out of court statements and asserted that they had no idea whether he was a member or not and even denied that they had any records evidencing his membership despite their letter to the contrary.

Copyright and Trademark Infringement

The parties also asserted claims of copyright and trademark infringement against each other. The OTO owns certain trademarks, primarily its name and seal, as well as valuable copyrights. The most notable of its copyrights are its rights to the literary property of the former OHO Aleister Crowley.

Both parties have published the copyrighted Crowley material, asserting their right to do so, and have similarly utilized the OTO trademarks. Since both sides deny that the other party has any rights to OTO property, both claim that the other has infringed the legitimate OTO trademarks and copyrights.

Conversion Of OTO Archive and Library

The OTO also possesses a valuable library and archi e. Plaintiffs seized the library and archive following the death of Mr. Germer and have refused defendants any access to them. Defendants asserted a conversion counterclaim with respect to the archive and library.

Libel

There are also libel issues based on statements made by defendants concerning plaintiffs. Defendants' statements were to the effect that plaintiffs were not legitimate officers of the OTO; that plaintiffs use of OTO trademarks and copyrights and seizure of its library and archive were without legitimate authority and so constituted misappropriation and theft of Order property. Defendants also asserted that plaintiffs had otherwise failed in their duties as OTO members, such as by failing to assist the impoverished widow of Mr. Germer, and allowing her to starve to death. Plaintiffs assert these statements were libelous.

Use of Tradename "Thelema"

One of the plaintiffs, Helen Smith, published books under the tradename "Thelema Publications". Defendants published books under the tradename "Thelema Publishing Company". "Thelema" is the Greek word for "Will" and is the name of the spiritual system followed by the OTO. (That is, it is a name comparable to "Judaism" or "Islam".)

Plaintiff Smith asserted a claim of unfair competition against defendants for use of the similar tradename. The parties stipulated that the right to this tradename was personal to Smith rather than plaintiffs' purported OTO organization. Therefore, the resolution of her asserted rights to the tradename did not depend on a showing that

plaintiffs's organization represented the legitimate OTO.

Smith testified that she first used her tradename in 1969 e.v. Defendants testified that they first used their tradename in 1962 e.v., asserting a right to the tradename through first use. As noted below, the district court found that it was Smith whose first use dated from 1962 e.v., although no plaintiff ever claimed that that was so.

First District Court Opinion

OHO Succession: The district court held that plaintiffs were the legitimate OTO and defendants were not. However, the district court did not say how it reached those conclusions. It did not state how it resolved the question of how the OHO succession is effected. It did

not explain how plaintiffs had met the conditions of the court's unstated theory of succession. It did not make a single citation to any evidence of record.

OHO in the United States: The district court also made a bizarre finding that neither plaintiffs nor the court of appeals ever mentioned, much less explained. The district court found that plaintiffs' leader was the OHO in the United States. Since the OHO is a worldwide office, this finding was impossibly contradictory. It suggested that the district court had confused the worldwide OHO office with a national OTO office called "the national King".

Property Rights: The district court held that plaintiffs were the legitimate OTO and therefore had the right to its trademarks, copyrights, library and archive.

Libel: The district court held that defendants had libelled plaintiffs and awarded defendants $40,000 in general damages and $100,000 in punitive damages though plaintiffs had proven no actual damages.

Thelema Tradename: It also held that the "Thelema" tradename had been used by plaintiffs before defendants, and that therefore plaintiffs were entitled to the use of the tradename. Even though the parties had stipulated that the name belonged to plaintiff Smith personally, the court found that it belonged to plaintiffs' organization. Even though Smith testified that her first use of the name was in 1969 e.v., the court found that her first use was in 1962 e.v.

Order of Remand

Defendants appealed. They argued that the district court's failure to state how it reached its conclusions or what evidence it had relied on violated Due Process. The court of appeals then remanded, requesting from the district court a supplemental opinion "specifying in detail the factual basis for its ultimate findings of fact".

Second District Court Opinion

The district court issued a supplemental opinion two years after the trial and without consulting a trial transcript. The court again did not make a single citation to the record, did not disclose how it thought the OHO succession was effected, and did not

state how plaintiffs had met the conditions of its unstated theory succession.

OHO Succession: What was clear was that whatever theory the district court had relied on with respect to the OHO succession, it was not one that had been espoused by any of the parties to the case. That is, the district court included no finding about plaintiffs' leader "doing the administrative work", or having "emergency powers", or being the "seniormost" member (plaintiffs' theories of succession). It also did not find that he had been appointed OHO by his predecessor Mr. Germer (defendants' theory of succession).

OHO in the United States: The district court failed to explain how it could find that plaintiffs' leader was the OHO in the United States and still

award plaintiffs worldwide authority within the church.

The district court also offered several crucial findings not hinted at by its original opinion, which defendants believe are simply out-and-out errors if not lies.

Refusal to Allow Briefing

Defendants then moved in the court of appeals to file a brief addressing the new findings in the supplemental opinion. The court of appeals denied the motion to file a new brief and affirmed the district court in a brief memorandum opinion relying specifically on the new findings. That is, defendants lost their appeal on the basis of a district court opinion which defendants never had an opportunity to brief.

Opinion of Affirmance

OHO Succession: Like the district court opinion, the opinion of affirmance cites no evidence in the record and does not disclose its conclusion as to how the OHO succession is effected or how plaintiffs met the conditions for that succession.

OHO in the United States: The court of appeals never mentioned the finding that plaintiffs leader was the OHO in the United States, nor how that finding could possibly be affirmed given that the OHO is an international, rather than a national office.

Libel: The court of appeals also upheld the libel finding on the ground that the statements made by defendants were not true and refused to find those statements privileged by the First

Amendment as part of a religious controversy.

In addition, without offering any explanation, the court of appeals upheld all of the libel findings even though plaintiffs admitted in their brief on appeal that some of the statements found libelous had not even been made by defendants.

"Thelema" Tradename: Similarly, without explanation, the court of appeals upheld the finding of first use by plaintiff Smith of the tradename in 1962 e.v. in the face of her own testimony that her first use occurred in 1969 e.v., and the finding that the tradename belonged to plaintiffs' organization despite the stipulation by the parties that it belonged to Smith personally.

Rehearing Denied

Defendants' petition for a rehearing en banc was denied.

Plaintiffs now advertise the district court decision as "the recent landmark court decision establishing [plaintiffs'] legitimate succession." (See appendix).

Plaintiffs would now like to pursue this same litigation in Brasil against defendants for which they will need the approval of the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECIDED THE CASE ON THE BASIS OF AN EX PARTE COMMUNICATION.

By deciding the case on the basis of an ex parte communication with the

district court which defendants were never allowed to address, the court of appeals committed a gross violation of Due Process.

By requiring defendants to brief the case before being presented with the crucial findings of fact of the district court's second opinion, the court of appeals denied defendants' fundamental Due Process rights: the opportunity to be heard at a meaningful time and in a meaningful manner, with notice of the case against them, and an opportunity to make relevant arguments with respect to the specific issues of the case. Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Holt v. Virginia, 381 U.S. 131 (1965); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Willner v. Committee on Character, 373 U.S. 96 (1962); Joint

Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-2 (1951)(Frankfurter, J, concurring); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

Defendants were deprived of their right to be heard at a meaningful time and in a meaningful manner. The district court's first opinion resolved the entire dispute in just two conclusory sentences: "[Plaintiffs' organization] is a continuation of the organization, beliefs and practices originally established and conducted by Crowley and OTO", and "[Defendants' organization] is not the continuation of the organization, beliefs and practices originally established and conducted by Crowley and OTO".

In its second opinion, the district court set forth all the factual findings

underlying its conclusion, fourteen in all; these findings were not only not hinted at by the first opinion but did not even conform to plaintiffs' theory of the case.

For instance:

(1) The second opinion found that there was a document evidencing the intention of Crowley that plaintiffs' leader be OHO. Neither court specified the document that is being referred to and plaintiffs themselves never claimed there was such a document. If given the opportunity, defendants will demonstrate that there is no such document.

(2) The second opinion found that there was no evidence that Mr. Germer disapproved Crowley's "appointment" of plaintiffs' leader as OHO. If given an opportunity, defendants will show not only was this not true, but that

plaintiffs' leader himself testified to precisely the opposite.

(3) The second opinion found that Mr. Germer's widow acknowledged that plaintiffs' leader was OHO. If given an opportunity, defendants will demonstrate not only that the record is devoid of any evidence whatsoever to that effect, but that no party to the case ever even claimed that it was so, much less asserted it as in any way relevant to the case.

(4) The second opinion found that defendants' organization only had a single member. If given an opportunity, defendants will demonstrate that the record is plain that defendants have only one member in the United States, not worldwide.

(5) The second opinion found that an old OTO Lodge (Agape Lodge) was a direct

predecessor of plaintiffs' organization. If given an opportunity, defendants will demonstrate that the record is devoid of any evidence whatsoever to that effect and that plaintiffs never even claimed that that was so.

(6) In its brief to the court of appeals, before the district court issued its second opinion, defendants attacked the various theories of succession offered by plaintiff, i.e., the "emergency" theory, the "administrative work" theory, and the "seniormost" theory. The second opinion showed that whatever theory the district court relied on, it was not one of the theories advanced by plaintiffs, so that defendants have never been allowed to brief the theory on which the entire case turned.

Although the court of appeals refused

to permit defendants to address the new findings in the second opinion, that court based its opinion squarely on those findings.

Defendants asked only for the opportunity to demonstrate that the second opinion is based on findings that no rational person could possibly have made on the record in this case; they are out-and-out errors if not lies.

The court of appeals' action in denying defendants the right to brief the district court's second opinion and so basing its affirmance on an ex parte communication with the district court is such an astonishing overthrow of the most basic precepts of judicial procedure as to demand the intervention of this Court's supervisory power.

II. THE COURTS BELOW IMPROPERLY DECIDED QUESTIONS OF CHURCH DOCTRINE.

The courts below disposed of this case by deciding a question of internal church doctrine in blatant disregard of this Court's holdings that the First Amendment absolutely forbids that. Jones v. Wolf, 443 U.S. 595 (1979); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Church, 393 U.S. 440 (1969).

This Court held in Jones v. Wolf, supra that civil courts may apply neutral principles of secular law to award property to one party or another in an internal church dispute in order to avoid making such an award on the basis of the court's resolution of an underlying religious controversy.

But the courts below did not do

that. Instead they applied "secular evidence" (whatever that is) to determine which party was the "legitimate" church, a purely religious question, and then awarded the property to the party the courts below considered legitimate. The court of appeals stated this quite clearly:

> "It is also clear that this issue [of who is entitled to the church's property] turns largely on whether [plaintiffs' leader] or [defendants' leader] succeeded Mr. Germer as the Outer Head of the Order (OHO) and on whether the issues of continuation and succession can be decided without impermissibly adjudicating questions of religious doctrine, practice, organization, or administration.
>
> We hold that ample secular evidence supports the district court's findings that plaintiffs' organization is, and [defendants' organization] is not, the continuation of the original OTO, and its findings that [plaintiffs' leader] is, and [defendants' leader] is not, the OHO." (June 4, 1987 e.v. opinion, pages 1-2)[Bracketed material added].

Since there is no "secular" method of

determining how the OHO succession is effected or the question of legitimacy within the church, the court's holding is a complete nonsequitur and flagrantly unconstitutional.

Thus, the court of appeals has turned the holding of Jones v. Wolf completely upside-down by saying that "secular evidence" may be looked to by civil courts to resolve a religious question (in this case, the manner of effecting OHO succession and legitimacy within the church) which in turn is used to resolve the property dispute. If courts can go as wrong as the courts did below in this case, then the Court should act immediately to stop this incursion into the First Amendment, and to reaffirm its line of decisions in this area.

It should be noted that the situation involved here was anticipated by then

Justice Rehnquist's dissent in Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 726-7 (1976), which pointed out that the majority's decision there would give no guidance when what was at issue was the legitimacy of the church's highest authority itself. This case now presents that problem in that the courts below have made the case turn on the determination of who the OHO is. The Court should grant the petition in order to decide this important issue left open by the Milivojevich case.

III. THE COURT OF APPEALS APPLIED AN IMPROPER STANDARD UNDER THE FIRST AMENDMENT.

The court of appeals failed to apply the proper standard in reviewing the district court action. Where the entire issue is as to who is the highest authority within a church, the court

should not have decided in favor of one of the parties unless it was convinced beyond a reasonable doubt that the proper authority had been determined. Any other standard would substitute the civil court as an ecclesiastical authority, which the First Amendment clearly forbids. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Church, 393 U.S. 440 (1969).

That is, the need for the reasonable doubt standard in this context is a corollary of the rule forbidding a civil court from deciding church doctrine (see Part II herein). While Milivojevich allows the resolution of a church dispute by relying on the church's highest authority, if the court is allowed to determine that authority on a mere preponderance of the evidence standard,

it will itself become embroiled in the church dispute. The reasonable doubt standard, the judicial equivalent of certainty, is thus required to keep the civil court out of the fray while preventing abuse through merely frivolous claims.

To understand what can happen under the standard utilized by the courts below, this Court must be aware of the specifics. The lower courts denied defendants' First Amendment rights on the basis of declaring the "legitimacy" of a claimant [plaintiffs' leader] to supreme church authority where:

(a) The claimant's co-plaintiffs denied, in writing, prior to their arrival in Court, that he was such authority.

(b) The claimant denied in his

deposition and in a related case that he was such authority.

(c) The claimant never claimed to be such authority prior to testifying in court.

(d) The claimant's sole explanation for why he never previously claimed to be such authority was, "I didn't think of it at the time."

(e) The claimant asserted such authority on the basis of having a title which does not exist anywhere in the church's governing documents.

(f) The claimant's theory for how he obtained his authority was that there was a secret amendment to the church constitution by a prior church authority which no one in the church was ever told about except the claimant.

(g) The claimant and his co-plaintiffs are unable to agree on the

reason why he has his authority and each such plaintiff offers a theory of succession which contradicts the theories offered by the others.

Even if none of these weaknesses appeared in plaintiffs' case, defendants fail to see how the court of appeals could possibly have affirmed the district court decision when, despite even the multiplicity of plaintiffs' theories, the district court upheld McMurtry's authority on a theory of internal church succession not argued for by any member of the church.

Following the same standard, the court of appeals affirmed a finding that defendants' leader was not even a member of the church even though:

(a) All the documentary evidence in the case showed that he was a member, and

(b) Plaintiffs, in order to support

their position that defendant was never a member of the church, had to recant their repeated, consistent and specific out-of-court statements in writing that he is a member.

Since the use of the lower standard of review employed by the court of appeals in this case allows the infringement of important First Amendment rights, this important but undecided question should be addressed by the Court.

IV. THE COURTS BELOW FAILED TO STATE THE BASIS FOR THEIR DECISIONS.

The courts below repeatedly failed to articulate any basis whatsoever for their decisions. This violates Due Process and Fed. R. Civ. P. 52(a) which require a decisionmaker to state the reasons for its determination and indicate the evidence it relied on. Goldberg v.

Kelly, 397 U.S. 254, 271 (1970); Schneiderman v. United States, 320 U.S. 118, 130 (1943); Kelley v. Everglades Drainage District, 319 U.S. 415, 420-2 (1943); Fluor Corp. v. United States ex rel Mosher Steel Co., 405 F.2d 823, 828 (9th Cir.), cert. denied, 394 U.S. 1014 (1969); Irish v. United States, 225 F.2d 3, 8 (9th Cir. 1955). If the courts are not required to give a reason for their results or explain how they reached them, a litigant's rights would be rendered meaningless.

This is particularly important here as the failure to articulate their reasoning allowed the courts to conceal that they infringed important First Amendment rights.

For instance, the courts below viewed the crux of this case as whether plaintiffs' or defendants' leader

succeeded to the position of OHO. The parties espoused different theories as to how this succession is effected within the OTO. The courts below decided in plaintiffs' favor on this issue but neither court's opinion states how the succession is effected. That is, the entire basis for the decisions below does not appear in the courts' opinions. If it had, it would have been clear that the courts had made some decision about how the chain of authority within the church is effected, and so clearly revealed that the courts had decided questions of internal church doctrine and practice.

The failure to articulate a basis for the decisions below also allowed the court of appeals to affirm the district court decision as supported by substantial evidence even though the district court had not cited a single

piece of evidence from the record (nor does the court of appeals).

Furthermore, neither court explained how they could find that plaintiffs' leader is the OHO "in the United States" and yet entitled to authority within the OTO worldwide.

In addition, the failure to explain how it reached its conclusions also allowed the court of appeals, with no explanation, to:

(1) uphold the $140,000 libel judgment even though based on statements which plaintiffs admitted in their brief on appeal were not even made by defendants, and

(2) uphold a finding of first use in 1962 e.v. of the tradename "Thelema" by plaintiff Smith in the face of her testimony that her first use was in 1969 e.v.

Since the result of the decisions below was to eject defendants from their church, the First Amendment should require at the very least that the courts state the reason for that result.

Given the importance of these procedural and religious rights, the Court should grant this petition. At a minimum, the court of appeals' failures in this regard so tarnish the image of Justice as to call for this Court's supervisory intervention.

V. THE LIBEL JUDGMENT VIOLATED DEFENDANTS' FIRST AMENDMENT RIGHTS.

The common law has long recognized a privilege in the defamation area for statements made in the context of religious controversies over the fitness for membership or office of those within a church or fraternal society. Pinn v.

Lawson, 72 F.2d 742 (Ct. App. D.C. 1934); Slocinski v. Radwan, 83 N.H. 501, 144 A. 787 (1929); Creswell v. Pruitt, 239 S.W.2d 165 (Tex. Civ. App. 1951); Simmons v. Dickson, 110 Tex. 230, 213 S.W. 612 (1919), modified on other grounds, 110 Tex. 230, 218 S.W. 365 (1920); Rankin v. Phillippe, 206 Pa. Super. 27, 211 A.2d 56 (1965); Cadle v. McIntosh, 51 Ind. App. 365, 99 N.E. 779 (1912); Bayliss v. Grand Lodge of State of Louisiana, 131 La. 579, 59 So. 996 (1912).

In Cantwell v. Connecticut, 310 U.S. 296, 84 L.Ed. 1213 (1940) this Court held that the First Amendment imposed strict limitations on the ability of the government to place limitations on religious speech.

In New York Times Co. v. Sullivan, 376 U.S. 254, 11 L.Ed.2d 686 (1964) the Court extended the Cantwell principles to

the political arena and held that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." 376 U.S. at 277.

This case presents the Court with an opportunity to make plain that the New York Times principles apply in the religious context as well. That is, the Court should hasten to prevent this outrage: that defendants, having stated their beliefs that plaintiffs were usurpers ineligible for the offices and rights plaintiffs had claimed, having stated that plaintiffs had misappropriated church property and violated every fundamental principle of upstanding church membership, should be faced with a civil court, having decided that defendants were "wrong", imposing

$40,000 in damages for defendants' "errors" and $100,000 in punitive damages.

Defendants argued for the application of the common law privilege in this case. Defendants also argued for an absolute constitutional privilege where defendants were asserting a defense of truth, and the determination of whether or not their statements were true hinged entirely on nonjusticiable questions of internal church doctrine and practice. [That is, the defense of absolute privilege implicates the issues discussed in Part II above.] The court of appeals improperly refused to even consider either privilege.

Whether defendants' statements were true or not hinged upon whether defendants' were correct in their belief that plaintiffs were usurpers ineligible for the offices and rights plaintiffs'

claimed to have in the church. If defendants' belief was correct, the statements were true; if defendants were not correct the statements were false. A civil court has no business making up its own mind about such a matter and imposing $100,000 penalties to enforce its ecclesiastical determination of blasphemy.

In this the courts below have gone beyond trampling the First Amendment and have attacked the fundamental principle upon which this country was founded. This Court must not let that lie. This country has always been a source of spiritual innovation, which many consider to be part of its richness. It must be plain to any jurist what the impact of the threat of $100,000 in punitive damages must be to that innovation. The violation of the church and the First Amendment instigated by the courts below

must not be allowed to stand.

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APPENDIX INDEX

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRADY MCMURTRY, et al,

Plaintiffs-Appellees,

v.

SOCIETY ORDO TEMPLI ORIENTIS, et al.,

Defendants-Appellants.

No. 85-2897
D.C. No. C-83-5434-CAL

MEMORANDUM

Filed: June 4, 1987

Appeal from the United States District Court for the Northern District of California
Charles A. Legge, District Judge, Presiding
Argued December 11, 1986, San Francisco, California, submitted April 13, 1987

Before: NORRIS, BEEZER, and BRUNETTI, Circuit Judges

It is clear that the critical issue in this case is whether plaintiff Ordo Templi Orientis or defendant Society

Ordo Templi Orientis (SOTO) is a continuation of the original Ordo Templi Orientis (OTO) and thus entitled to its property. It is also clear that this issue turns largely on whether McMurtry or Motta succeeded Mr. Germer as the Outer Head of the Order (OHO) and on whether the issues of continuation and succession can be decided without impermissibly adjudicating questions of religious doctrine, practice, organization, or administration.

We hold that ample secular evidence supports the district court's findings that plaintiff OTO is, and SOTO is not, the continuation of the original OTO, and its findings that McMurtry is, and Motta is not, the OHO. As is evident from the district court's additional findings, the district court did not

base these findings on its adjudication of religious questions. Rather it based its findings on secular indicia about the relative credibility of the testimony before it, on the lack of evidence that Motta or SOTO ever had any official connection to OTO, on the ample evidence that McMurtry and plaintiff OTO have longstanding and established connections to OTO, on the fact that SOTO appears to be a nonfunctioning organization with only one member -- Motta -- whereas plaintiff OTO has numerous members who recognize McMurtry as the OHO, on the fact that plaintiff OTO has actually used and possessed the intangible and tangible property at issue, and on evidence showing that previous OHOs worked closely with McMurtry and that Mr. Germer intended McMurtry to be his successor. Relying

on this evidence to adjudicate this dispute does not violate the First Amendment.

It is undisputed that the property at issue belonged to the original OTO. As the continuation of the original OTO, plaintiff OTO legally owns the names, initials, insignia, trademarks, tradenames, copyrights, writings, archives, and library that belonged to the original OTO. McMurtry's death does not change this fact because plaintiff OTO continues to hold the property in its corporate capacity. The district court thus appropriately resolved all the non-libel claims and counterclaims.

Since the property belonged to plaintiff OTO, defendants cannot assert truth as a defense to the claim that they libeled plaintiffs by accusing the plaintiffs of various property

offenses. We thus also affirm the district court's conclusion that defendants libeled certain plaintiffs by accusing them of these property offenses as well as by accusing them of assaulting and robbing Sasha Germer and contributing to her death. We find no error in the district court's application of collateral estoppel against the defendants but not against the plaintiffs since plaintiffs were not a party to the previous proceeding; any error in applying collateral estoppel would be harmless anyway since the district court allowed both sides to present evidence. None of appellants' other arguments has any merit.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GRADY MCMURTY, et al.,
Plaintiffs,

v.

SOCIETY ORDO TEMPLI ORIENTIS, et al.,
Defendants.

No. C-83-5434-CAL

Filed: July 10, 1985

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

The action was tried to the court without a jury from May 13 through May 17, 1985, and was then submitted for decision. The court has heard the testimony, read the exhibits, and weighed the evidence. The court makes the following findings of fact by a preponderance of the evidence, makes the following conclusions law, and directs that judgment be entered in favor of

plaintiffs and against defendants on plaintiffs' complaint, defendants' counterclaims, and plaintiffs' counterclaims to the counterclaims.

For simplicity, plaintiffs, counter-defendants, and counter-counter plaintiffs will be called "plaintiffs;" and defendants, counterclaimants, and counter-counter defendants will be called "defendants."

FINDINGS OF FACT

1. The organization and system of beliefs which is called "Ordo Templi Orientis" or "OTO" is a mystical and fraternal organization begun around 1900. The chief international executive of OTO is known as the "Outer Head" or "OHO." Aleister Crowley became OHO in approximately 1921 and served until his death in 1947. Crowley wrote, or rewrote from earlier versions, many of

the rituals, doctrine, and interpretative and instructive literature of OTO. Crowley set forth the rules of operation and procedures of OTO in numerous books, essays, and correspondence.

2. OTO had and now has lodges where its members meet. On such lodge, which existed during the 1930's and subsequently, was Agape Lodge in California.

3. After Crowley's death, Karl Germer became the OHO.

4. At his death, Crowley left all of his previously undisposed intellectual and tangible literary property to OTO. As OHO, Karl Germer took possession of all of the tangible property of OTO around 1950 and moved the property to California.

5. Karl Germer died in

California in 1962. No will of Germer was offered for probate and the property of OTO remained in the possession of Germer's widow, Sasha Germer.

6. Sasha Germer died in 1975.

7. In 1976, plaintiffs obtained an order from the Superior Court of the State of California, Calavaras County, "In the Matter of the Estate of Sasha Germer." The order decreed that plaintiff Grady McMurtry was authorized to take possession, on behalf of OTO, of certain property identified as belonging to OTO. Pursuant to that order plaintiff McMurtry and others took possession of properties which had formerly been in the possession of Crowley, Karl Germer, Sasha Germer and OTO.

8. Plaintiff OTO is now a California Corporation. It has a legal

structure; is a membership organization; maintains records; has a set of beliefs; has an established set of procedures; conducts regular meetings; conducts financial transactions; initiates and promotes members; and follows the beliefs and practices derived from Crowley and the prior unincorporated OTO. It is a continuation of the organization, beliefs and practices originally established and conducted by Crowley and OTO.

9. Defendant Society Ordo Templi Orientis ("SOTO") was incorporated in the State of Tennessee. SOTO is not the continuation of the organization, beliefs and practices originally established by Crowley and OTO.

10. Defendant Motta is a citizen of Brazil. He has for years

been interested in the work of OTO and Crowley. Motta has caused some literary works of Crowley to be published, commented, and edited, in his own name and in the name of OTO and SOTO.

11. Plaintiff OTO now owns, holds all right and title to, has used, does now use, and has the right to use: the name "Ordo Templi Orientis;" the initials "OTO;" the various insignia, registers and symbols of OTO; all writings and publications of Crowley which were not assigned to others at the time of his death; the publications of other matters pertaining to OTO; and the trademarks, service marks, and copyrights pertaining to the same. Defendants do not own, hold, or have any right to the use of such properties.

12. The name "Thelema" in connection with publications is a part

of the property owned by plaintiff OTO. Plaintiff Smith has used that name on behalf of plaintiff OTO in publications since 1962. Plaintiff OTO has the rights to the trademarks, service marks and copyrights of the name "Thelema," and equivalents of that name, in connection with publications.

13. Defendants have used the name "Thelema" in publications subsequent to its use by plaintiffs. Defendants do not have ownership of or the legal right to use the name "Thelema" or it equivalents. Defendants' use of the name of "Thelema" was without the consent of plaintiffs and constitutes infringement of that name. Defendants' use of the name "Thelema" in connection with publications has caused confusion in the publishing industry and among purchasers

of books, and will if continued cause confusions in the future. However, plaintiffs have not shown sufficient evidence of monetary losses from that confusion to support an award of compensatory damages for defendants' improper use of the name "Thelema."

14. Defendants' use, and purported registration of trademarks and copyrights under the names "OTO," "Crowley," and "Thelema" were done in contemplation of this litigation and were done with the rights of ownership of the property purportedly registered and copyrighted.

15. Plaintiff McMurtry is the acting OHO of OTO in the United States and is the highest overall member. Plaintiff McMurtry was personally assigned by Crowley, and continues to own, a 25% interest in Crowley's "Magick

Without Tears."

16. Defendant Motta is not the OHO of OTO.

17. In 1981 defendants published and distributed certain books in California and elsewhere which contained statements regarding the individual plaintiffs listed below. Certain of the statements were matters of opinion, or were matters pertaining to religious beliefs, and hence are protected under the First Amendment. The following statements about individual plaintiffs were not protected and were libelous:

a. Plaintiff Phyllis Seckler (nee Phyllis Wade, Phyllis McMurtry) was accused of sending a gang to assault and rob Sasha Germer, and was alleged to have misappropriated property.

b. Plaintiff Grady

McMurtry was alleged to have committed slander, misappropriated property, pirated property, delivered property to the hand of thieves, and contributed to the death of Sasha Germer.

c. Plaintiff Helen Parsons Smith was alleged to be a thief.

d. Plaintiff James Wasserman was alleged to have delivered property to thieves and to have pirated property.

18. The statements made about the plaintiffs enumerated in paragraphs 17-a, b, b and d were untrue and constituted libel per se.

19. The plaintiffs enumerated in paragraphs 17-a, b, c and d did not establish by sufficient evidence any special damages, but are entitled to general damages from defendants in the amounts of $10,000 each.

20. The publications of the libels in paragraphs 17-a, b, c, and d were done with actual malice by defendants, with knowledge of their falsity, and with a reckless disregard for the truth, and those plaintiffs are entitled to punitive damages from defendants in the amount of $25,000 each.

21. Neither plaintiffs nor defendants are parties engaged in the media business, and are not entitled to rights or defenses attributable thereto.

22. There is not sufficient evidence to establish that defendants obtained any substantial gross revenue or profit from their publications, or that plaintiffs lost any gross revenue or profit, to support an award of damages to plaintiffs for defendants' use of plaintiffs' names, publications or symbols.

23. Plaintiff Wasserman was an agent of defendant Motta for certain purposes in 1976. Plaintiff Wasserman terminated that agency in 1976, and the termination was acknowledge by defendant Motta. Any cause of action by Motta for the breach of that agency relationship by Wasserman accrued in 1976.

24. No property of defendants was converted by plaintiffs. Even if some personal properties of defendants were included in the material obtained by plaintiffs from Karl and Sasha Germer, they were obtained in 1976, and the obtaining was known to defendants in 1976.

25. Plaintiffs circulated among OTO members a letter written by defendant Motta to Karl Germer dealing with certain matters personal to Motta. Motta has not shown by sufficient

evidence that the circulation was a violation of this right of privacy, or that the circulation caused him any special or general damages. The circulation was not done with malice, but in connection with the dispute between plaintiffs and defendants as to who was the OHO and who rightfully held the properties of OTO. The circulation occurred, and was known by defendant Motta to have occurred, more than one year prior to the filing of the complaint in this action.

26. Unless enjoined, defendants will continue to claim and use the name "Ordo Templi Orientis" and the initials "OTO," and will continue to claim that defendant Motta is the OHO of OTO, and will use plaintiff OTO's names, insignia, initials, symbols, trademarks and other properties of plaintiff OTO to

the injury of plaintiff OTO.

CONCLUSIONS OF LAW

1. To the extent that any of the above findings of fact may be deemed to be conclusions of law, they are incorporated by reference herein.

2. The libelous statements enumerated in paragraphs 17-a, b, c, and d of the findings of fact are libel per se, and general damages are presumed.

3. The other allegedly libelous statements about plaintiffs enumerated in the third and fourth causes of action of plaintiffs' first amended complaint are not actionable because they are matters of opinion or are religious matters protected by the First Amendment to the Constitution of the United States.

4. Any publications by defendants of allegedly libelous

statements about plaintiffs which occurred subsequent to the filing of the first amended complaint cannot be the basis for any award of damages to plaintiffs in this action.

5. Plaintiffs are entitled to judgment on their first amended complaint against defendants as follows:

a. On the first cause of action for unfair competition regarding the use of the name "Ordo Templi Orientis," and the initials "OTO," and the insignia and other properties of OTO.

b. On the second cause of action for infringement of trademarks owned by plaintiff OTO.

c. On the third and fourth causes of action for the libels enumerated in paragraphs 17-a, b, c, and d of the findings of fact.

d. On the fifth cause of

action for unfair competition in the use of the name "Thelema."

6. By virtue of the decision of the United States District Court for the District of Maine, United States District Judge Gene Carter, in the action entitled Motta, et al v. Samuel Wiser, Inc., No. 81-0459, defendants are collaterally estopped from asserting certain of their counterclaims against plaintiffs. Judgment should be entered in favor of plaintiffs and against defendants on defendants' counterclaims as follows, both because of the collateral estoppel effect of that action and because of the findings of fact which are made above.

a. Defendants do not own the Crowley copyrights.

b. Motta is not the OHO of OTO.

c. Defendants' purported registration of copyrights are not valid because defendants do not own the property purportedly copyrighted.

d. Plaintiffs did not breach any copyrights of defendants, as allege in defendants' first counterclaim.

7. Plaintiffs did not violate defendants' alleged trademarks regarding the insignia of OTO, as alleged in defendants' second and eighth counterclaims.

8. Plaintiffs did not violate defendants' alleged trademarks regarding SOTO, as alleged in defendants' third counterclaim.

9. Defendants' fourth counterclaim is barred by the statutes of limitations, either by the two year statute of limitations provided in California Code of Civil Procedure

Section 339 or by the three year statute of limitations provided in California Code of Civil Procedure Section 338; the cause of action accrued in 1976 and was barred prior to the filing of the complaint in this action in March 1983.

10. Defendants' fifth counterclaim is barred by the three year statute of limitations provided in California Code of Civil Procedures section 338; the cause of action accrued in 1976 and was barred prior to the filing of the complaint in this action in March 1983.

11. Defendants' sixth counterclaim is barred by the one year statute of limitations provided in California Code of Civil Procedure section 340; the cause of action had accrued and was barred prior to the filing of the complaint in this action

in March 1983.

12. Plaintiffs have not waived their statute of limitations defenses by not specifically asserting them in an answer to defendants' counterclaims.

13. Plaintiffs did not breach any federal trademark regarding the name "Ordo Templi Orientis" as alleged in defendants' seventh counterclaim.

14. Plaintiffs did not breach any federal trademark in the symbol "OTO" as alleged in defendants' eighth counterclaim.

15. Plaintiff OTO is entitled to the exclusive use of the trademarks and names claimed by defendants in their counterclaims, except those of SOTO.

16. Plaintiff McMurtry owns the interest in "Magick Without Tears" assigned to him by Crowley.

17. Plaintiff OTO is entitled

to possession and ownership of: the remainder of the copyrighted material about OTO, the archives of OTO, and the remainder of the writings of Crowley.

18. Defendants' purported registration of trademarks are invalid and of no legal effect, because defendants did not and do not own the marks, except those of SOTO.

19. Plaintiffs are entitled to injunctive relief request in their counterclaim to the counterclaim.

JUDGMENT

Plaintiffs are to submit to this court, within twenty days of the date below, a proposed form of judgment incorporating these findings and conclusions. Plaintiffs are to simultaneously submit the proposed form of judgment to defendants, and within ten days thereafter defendants are to

advise the court in writing what objections they have to the proposed form of judgment prepared by plaintiffs. Judgment will then be entered by the court.

Dated: July 10, 1985.

CHARLES A. LEGGE
UNITED STATES
DISTRICT JUDGE

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRADY MCMURTRY, et al,

Plaintiffs-Appellees,

v.

SOCIETY ORDO TEMPLI ORIENTIS, et al.,

Defendants-Appellants.

No. 85-2897
D.C. No. C-83-5434-CAL

O R D E R

Filed: January 12, 1987

Before: NORRIS, BEEZER, and BRUNETTI, Circuit Judges

This case is remanded, and submission is vacated for the limited purpose of having the district court make additional findings specifying in detail the factual basis for its ultimate findings of fact that Plaintiff

OTO is, and Defendant OTO is not, the continuation of the original OTO and its findings that McMurtry is, and Motta is not, the OHO. See Findings of Fact 8, 9, 15, 16. The district court shall also make conclusions of law explaining the court's reasons as to why its adjudication of the issues in this case does not transgress First Amendment prohibitions against resolving church property disputes by adjudicating questions of church doctrine, practice, organization, or administration. See generally Jones v. Wolf, 443 U.S. 595 (1979); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Maryland and Virginia Eldership v. Church of God, 396 U.S. 367 (1970); Presbyterian Church v. Mary Elizabeth Blue Hull Church, 393 U.S. 440 (1969). Within ninety (90) days the district

court shall make such additional findings of fact and conclusions of law or request an extension of time from this court within which to do so.

This case will stand submitted following remand, and this panel shall retain jurisdiction over the appeal.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GRADY MCMURTRY, et. al,

Plaintiffs,

v.

SOCIETY ORDO TEMPLI ORIENTIS, et. al,

Defendants.

No. C-83-5435-CAL

Filed: April 6, 1987

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Additional Findings of Fact

The Court of Appeals remanded the case to this court to "make additional findings specifying in detail the factual basis for its ultimate findings of fact that Plaintiff OTO is, and Defendant OTO is not, the continuation of the original OTO and its findings that McMurtry is, and Motta is not, the

OHO." That remand pertains primarily to findings of fact 8, 9, 15, and 16.

This court believes that its original findings of fact meet the standards of adequacy defined by Fed.R.Civ.P. 52(a) and by this Circuit in Nicholson v. Board of Education, 682 F.2d 858 (9th Cir. 1981) and Unt v. Arrowspace Corporation, 765 F.2d 1440 (9th Cir. 1985). Nevertheless, since the Court of Appeals has requested additional findings, the court makes the following additional findings of fact on the issues defined by the Court of Appeals:

27. Defendant Motta was not a credible witness. His testimony was incomplete, evasive, and contradictory, and was impeached in important particulars. Motta admitted to lying under oath in the action referred to in

Conclusion of Law 6. There was no credible evidence that defendant Motta was initiated into OTO and became a member thereof. Motta has made inconsistent prior statements as to whether he does or does not claim to be OHO.

28. Plaintiffs' witnesses McMurtry, Parsons-Smith, Seckler, Heidrick, and Wasserman gave credible testimony regarding the transfers of property, and the history, publications, and organizational structure of OTO.

29. Plaintiff OTO has made actual use of the names, initials, insignia, copyrights, and trademarks at issue.

30. Plaintiff OTO has allowed third parties to publish material originally protected by the copyrights of Aleister McCrowley if plaintiffs' role in the publication is acknowledged by those

third parties. The third parties have done so.

31. Plaintiffs have had actual and lawful possession of the writings and archives of Crowley and Germer.

32. The California Agape Lodge was the only OTO lodge existing in the United States at the time Crowley died. That lodge was a direct predecessor of plaintiff OTO.

33. There was no credible evidence that defendant SOTO ever received a charter from OTO.

34. There was no credible evidence that defendant SOTO is a membership organization, maintains records, has an established set of procedures, conducts regular meetings, conducts financial transactions, or initiates or promotes members.

35. Motta has been the sole member

of SOTO, and SOTO now has no other members, in the United States.

36. Plaintiff McMurtry has been acting as the OHO of OTO for an indefinite but significant number of years.

37. Several documents evidenced a close mentor relationship between Crowley and McMurtry, and that responsibilities and authorities were vested in McMurtry by Crowley and by Germer.

38. One document evidenced the intent of Crowley that McMurtry be OHO.

39. There was a subsequent dispute between Germer and McMurtry, but no credible evidence that Germer intended to change Crowley's intended succession of OHO.

40. Germer's widow acknowledged McMurtry as the OHO. Numerous members

of OTO acknowledged their recognition of McMurtry as the OHO.

Additional Conclusions of Law

The Court of Appeals also remanded the case to this court to make "conclusions of law explaining [this] court's reasons as to why its adjudication of the issues in this case does not transgress First Amendment prohibitions against resolving church property disputes by adjudicating questions of church doctrine, practice, organization or administration." The court complies with that remand by making the following additional conclusions of law:

20. Defendants did not assert First Amendment contentions, except as follows:

(a) Defendants asserted the First Amendment as a defense to certain of plaintiffs' causes of action for

libel. This court respected that defense in Finding of Fact No. 17: "Certain of the statements were matters of opinion, or were matters pertaining to religious beliefs, and hence are protected under the First Amendment." And in Conclusion of Law No. 3: "The other allegedly libelous statements about plaintiffs enumerated in the third and fourth causes of action of plaintiffs' first amended complaint are not actionable because they are matters of opinion or are religious matters protected by the First Amendment to the Constitution of the United States."

(b) In defendants' Objections to Proposed Judgment and Costs, filed on August 12, 1985, after entry of the findings of fact and conclusions of law.

(c) In defendants' Motion to Alter, Amend, and Vacate the court's

opinion and for a new trial. However, that motion was not filed until September 26, 1985, outside of the time provisions of Rule 59(b) of the Federal Rules of Civil Procedure.

21. No other First Amendment defenses were asserted by defendants before or during trial. (a) In their first amended answer, motion to dismiss and counterclaim, defendants sought adjudication of the property rights which were put in issue by plaintiffs. (b) In the joint pretrial statement, both plaintiffs and defendants stated that the case was primarily about which of two groups were the owners of intellectual and tangible personal property; defendants sought ownership of the property and sought declaratory and injunctive relief setting forth its ownership rights. (c) Although the

court does not have a trial transcript, the court's notes indicate that defendants did not assert the First Amendment during trial, but continued to assert their alleged rights to the properties in question. (d) Defendants' Proposed Findings of Fact stated that OTO is "primarily the administrative and material branch" of the philosophical and religious system.

22. If the defendants' First Amendment claim now being made on appeal constitutes and affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure, that defense has been waived because it was not asserted in the pleadings or at trial.

23. However, if defendants' First Amendment claim now being made on appeal pertains to the jurisdiction of this court which is not waived by not

asserting it at or before trial, the following additional conclusions of law are relevant.

24. The matters at issue primarily involved secular libel, and disputes over the ownership of and rights to property, to wit: copyrights, trademarks, service marks, intellectual property, tangible personal property, writings, publications of Aleister Crowley, names, insignia and archives.

25. The resolution of those disputes involved the application of neutral principles of the law of property, contract, intestate succession, gift, express and implied trust, bequest, assignment, and libel.

26. Documents regarding religious dogma and theology were not and did not need to be reviewed to resolve those disputes.

27. The resolution of those disputes did not involve resolving disputes of underlying religious doctrine or practices.

28. No examination of religious precepts was done and none was necessary, to resolve the disputes.

29. Resolution of the disputes did not depend upon resolving any religious controversies or the application of any religious law.

30. The damages claimed by and awarded to plaintiffs primarily concerned issues of secular libel (see Findings of Fact 17, 18, 19, 20, and 21 and Conclusions of Law 2 and 4).

Dated: April 6, 1987.

CHARLES A LEGGE
UNITED STATED DISTRICT JUDGE

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRADY McMURTRY, et al.,
Plaintiffs-Appellees,
v.
SOCIETY ORDO TEMPLI ORIENTIS, et al.,
Defendants-Appellants.

No. 85-2897
D.C. No. 83-5435-CAL

O R D E R

Filed: May 8, 1987

Before: NORRIS, BEEZER, and BRUNETTI,
Circuit Judges

The motion by defendants-appellants to file a further brief is DENIED.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRADY McMURTRY, et al.,

Plaintiffs-Appellees,

v.

SOCIETY ORDO TEMPLI ORIENTIS, et al.,

Defendants-Appellants.

No. 85-2897
D.C. No. 83-5435-CAL

O R D E R

Filed: August 3, 1987

Before: NORRIS, BEEZER, and BRUNETTI, Circuit Judges

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.